83-349

No.

IN THE

Supreme Court of the United States

October Term, 1983

GREGORY T. LANG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Whether a Georgia Justice of the Peace who on a previous occasion has signed blank search warrants and initially denied such action under oath is "neutral and detached" as required by the Fourth Amendment of the United States Constitution and Article One, Section One of the Constitution of Georgia.

2. Whether an intrusion upon private property by a law enforcement officer under the guise of an administrative search is a violation of the Fourth Amendment guarantee against unreasonable searches when the law enforcement officer does not identify himself as such and during the course of the intrusion he gathers information later used in obtaining a search warrant.

3. Whether destruction of a large percentage of the marijuana that the defendant was convicted of trafficking in is a violation of the defendant's Sixth Amendment right to confront any and all evidence against him, when the destruction was accomplished without notice to the court, defense counsel, or the defendant, and where a statutory minimum quantity of marijuana is required for conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

CONSTITUTIONAL PROVISIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

The Petitioner, Gregory T. Lang, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Georgia Court of Appeals entered in this proceeding on January 31, 1983.

OPINION BELOW

The opinion of the Georgia Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered in the Supreme Court of the State of Georgia.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on January 31, 1983. A timely petition for rehear-

ing was denied on March 2, 1983. The Supreme Court of the State of Georgia denied a request for a writ of certiorari on June 15, 1983, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. *U.S. Const.* Amend. IV; Unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *U.S. Const.* Amend. VI; Rights of the accused:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case involved a series of searches and seizures conducted with and without search warrants. The area involved is commonly known as Spring Lake Meadow Farm (hereinafter the Farm). The area of the Farm, which is approximately 194 acres, is completely fenced and secluded. "No Trespassing" signs are posted throughout the area and

the road leading to the main residence and other outbuildings, and were plainly visible to law enforcement officers. (M.S. 156).

On December 29, 1981, Sheriff Pat Baker allegedly received a telephone call from a "confidential informant." The informant told the Sheriff that marijuana was presently being stored in a building on the Farm. He also stated that electric type alarm systems (eye beams) were visible on the property. (M.S. 221).

On approximately January 4, 1982, either Sheriff Pat Baker or Investigator Lester Stuck contacted Gordon County Building Inspector Steve Rhinehart. (M.S. 153). The purpose of this contact was to direct Inspector Rhinehart, who would be accompanied by Deputy Sheriff Stuck to proceed to the farm area for purposes of observation and "to conduct a final inspection." The true purpose of this visit was to further investigate the tip from the "confidential informant." (M.S. 155).

Once at the Farm, Investigator Stuck was never introduced nor identified as a police or law enforcement officer. (M.S. 154) However, the stated purpose of Investigator Stuck's presence at the Farm on that date was to observe, discover and investigate Gregory Lang and the Farm. (M.S. 155).

On January 5, 1982, with no additional information, Phil Price, Gary Newman of the G.B.I., Sheriff Baker and Officers Dutton and Stuck of the Gordon County Sheriff's Department decided that a search warrant should be obtained to search the metal building on the property. (T. 14).

Newman, who obtained the search warrant, was also the affiant in the Affidavit attached to the first search warrant. (M.S. 210, 211) This search warrant was obtained from Judge Warren Smith. No information other than

that contained in the affidavit in support of this first search warrant was given to the magistrate (P. 97, 105-107). All of the information known to the magistrate when issuing the warrant was contained in this affidavit. (P. 97, 105-107).

This first search warrant was then executed at approximately 4:00 P.M. Gregory Lang, who had the key to the locked building (M.S. 99) and was the person in control of the property and living on the property, was requested to open the building pursuant to the search warrant. Lang requested he be allowed to speak with counsel prior to opening the building. Officers consented to his request and accompanied him to his residence. During the same time, other members of the Sheriff's Department had forced entry into the building. Marijauna was found in that building. At that point, the Petitioner, Gregory Lang, was formally arrested. (P. 91)

The metal building (warehouse) contained over 1,000 alleged marijuana plants from six inches to six feet tall. (T. 104) Each plant was individually potted. There were also approximately 86 1000-watt mercury vapor light bulbs and fixtures, soil test kits, bags of potting soil and exhaust fans.

After weighing each of the plants except for the root and weighing other leafy material found in boxes and bags, the gross weight of the purported marijuana was 870 pounds. (T. 107)

On January 6, 1982, all but 100 grams of the purported marijuana was destroyed by law enforcement agents with the consent of the District Attorney, but without notice to Petitioner's counsel and without court order. (T. 92-94)

Petitioner was arrested and charged in a two-count in-

dictment with one count of trafficking marijuana and one count of possession of drug related objects.

A motions hearing was held on March 10, 1982, and the original indictment, Number 1924, was quashed at that time. Over defense counsel's objections, the trial court then heard the Petitioner's Motion to Suppress on that same day.

Petitioner was re-indicted on March 23, 1982. On April 5, 1982, a second motions hearing was conducted concerning the new indictment.

Trial of the case commenced on April 12, 1982. Petitioner was found guilty as charged and sentenced to ten (10) years imprisonment on Count One and one (1) year imprisonment on Count Two to run consecutive to Count One, but to be probated upon payment of a $25,000 fine.

A timely Motion for New Trial was filed and overruled by the trial court on July 8, 1982.

The case was appealed to the Georgia Court of Appeals, and on Janaury 31, 1983, the Petitioner's conviction was affirmed.

Petitioner filed a Motion for Rehearing within the time required by law. On March 2, 1983, the Court of Appeals denied the rehearing but wrote four additional pages, which were to be attached to the back of the original opinion.

Petitioner raised the questions sought to be reviewed by this court in two pre-trial motions. These motions appear in the Appendix hereto. The trial court denied both of these motions and the trial court's order also appears in the Appendix. Petitioner again raised the questions sought to be reviewed by this court in his enumerations of error to the Court of Appeals for the State of Georgia. These

enumerations and the opinion of that court appears in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW ERRED IN REFUSING TO THROW OUT EVIDENCE SEIZED AS THE RESULT OF ISSUANCE OF A SERIES OF SEARCH WARRANTS WHERE IT WAS SHOWN THAT THE GEORGIA JUSTICE OF THE PEACE WHO SIGNED THOSE WARRANTS WAS NOT NEUTRAL AND DETACHED AS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The neutrality and impartiality of the committing magistrate is the cornerstone of the judicial process whereby constitutionally limited permission is granted the goverment to search a private home and property. Petitioner argues that the decision of the Georgia appellate court in this case places a seal of approval on patently repugnant judicial conduct.

The most pressing reason for this tribunal to take action is that the committing magistrate in this cause continues to serve in the face of having signed a blank search warrant in a prior cause. Furthermore, the magistrate compounded that misconduct by lying under oath when confronted about his prior breach of neutrality and detachment. It should be emphasized that discovery of the complained of judicial misconduct was accomplished only through the painstaking work of Petitioner's trial counsel. On March 10, 1982, Georgia Justice of the Peace Warren Smith testified under oath as to his procedure for issuing search warrants. (M.S. 111-113). In response to direct questioning Judge Smith responded in the colloquy that follows:

Q: All right, sir. Have you ever seen any of those original warrants that you have there or forms similar to that, that was signed and not filled out?

A: No, Sir.

Q: Have you ever signed any original warrants that were not filled out?

A: No, Sir.

Q: At any time –

A : No.

Q: –since you've been Justice of the Peace?

A: No, sir.

Q: If someone had some warrants that were signed in blank with your signature, would that be with your authority or without your authority?

MR. WILSON: If it please the Court, we object to any hypothetical question; if so and so were to be. We don't think that's proper questioning and we object to it.

THE COURT: I sustain the objection. It's argumentative.

MR. SPRUELL: I didn't really finish my question. I don't think the question is argumentative.

THE COURT: Well, the Court has ruled, Mr. Spruell, that the question is argumentative, and it's not counsel's job to determine that. The Court has ruled that. Move on to the next question.

Q (By Mr. Spruell) Is it your statement that you have never signed a warrant –

THE COURT: He's already answered – it's his state-

ment that he's never signed a warrant in blank. Move to another question.

Q (By Mr. Spruell) Have you ever seen a warrant signed in blank?

A: No, Sir.

Less than thirty days later Judge Smith told the very same Court that he had signed a warrant in blank, had left it with a sheriff's dispatcher, and had lied about the matter at the previous hearing. (M.S.II 135-151) Judge Smith also related that the officer who had sought the subject warrant was subsequently terminated.

Petitioner concedes that no claim is made that in this cause Judge Smith signed a blank warrant. The Judge says that is not true and Petitioner has no evidence to the contrary. Nevertheless, Petitioner asserts that the contamination of the judicial process was complete prior to Judge Smith's execution of a search warrant directed to Petitioner's property. Judge Smith lost his neutrality and impartiality at least one year prior to January 5, 1982, and between March 10, 1982, and April 5, 1982, he lost his credibility by reason of having his prior misconduct exposed upon inquiry and lying about it.

The Georgia appellate court failed to respect the gravity of the error committed and wholly failed to provide a remedy.

2. THE DECISION BELOW WAS IN ERROR IN THAT IT ALLOWS INFORMATION OBTAINED DURING AN ILLEGAL SEARCH TO BE INCLUDED IN AN AFFIDAVIT THAT IS USED IN A LATER EFFORT TO OBTAIN A SEARCH WARRANT.

In his brief to the Georgia Court of Appeal, Petitioner raised the above issue. The facts which Petitioner relied upon were that on or about January 3, 1982, Sheriff Pat Baker or Investigator Stuck contacted Gordon County Building Inspector Steve Rhinehart for the purpose of gaining entry to the Lang farm, and that Investigator Stuck and Inspector Rhinehart did go on the Lang property without a warrant on January 4, 1982.

A. The trespass cannot be supported as an administrative search and Inspector Rhinehart was clearly an agent of the Gordon County Sheriff's Department.

The State failed to present any evidence justifying the entry of the building inspector, regardless of the circumstances. For example, no code section, ordinance or other statutory provision was demonstrated or introduced by the State in support of the fact that the building inspector, Steve Rhinehart, had authority to enter the property for purposes of a "final inspection." Even if Steve Rhinehart had authority to enter the property, the use of his authority to evade the warrant requirements of the United States Constitution cannot be condoned. Officer Lester Stuck testified as follows:

Q: Did you have a meeting with Steve Rhinehart along with the Sheriff, before you went out there?

A: Yes, sir, myself, Sheriff Baker, Deputy Dixon, and Steve Rhinehart had a discussion in the in-

vestigator's office prior to the time that I went to the farm.

This must lead to the conclusion that the Gordon County Building Inspector was not acting in his capacity as a building inspector, but as an agent of the Sheriff's Department, entering this property without a warrant. Officer Stuck's testimony continued as follows:

Q: Was it your decision or was it the Sheriff's decision for you to go out there undercover?

A: It was the Sheriff's decision that one of us should go and it was my decision that I go. (P. 48)

Q: All right, what was purpose of your going out there?

A: As part of my independent investigation. (P. 49) Also see (T. 21)

The State attempted to justify that warrantless search conducted by Lester Stuck on January 4, 1982, as an administrative search conducted by the building inspector. Seized as a result of that search were numerous items of information, including information concerning the alarm system, evidence of the storage building and factors concerning the Petitioner. It is clear that this illegally obtained information was relied on by Judge Smith in issuing the search warrant. (M.S. 102) [Testimony of Judge Warren Smith that he relied as corroboration on information obtained by Lester Stuck during this January 4, 1982 visit.]

B. The trespass by these officers onto property surrounded by "no trespassing" signs violated Petitioner's reasonable expectation of privacy.

The leading Georgia case on this subject is *Kelly v. State*, 146 Ga. App. 179 (1978). The *Kelly* case had shockingly similar facts to the instant case as to the initiation of a warrantless search. In *Kelly*, the testimony at trial was

that the Sheriff received a telephone call alerting him to suspicion that illegal activity was being conducted on a rural property. *Id* at 181. After receipt of this tip, the Sheriff and another officer rode to the area and looked through the area, where they spotted growing marijuana. The officers then arrested the individuals they saw in the marijuana field.

The Court found that the warrantless arrests were unlawful because a trespass on the Petitioner's property tainted the visual sighting. The State failed to disprove the taint. There, the evidence did not conclusively show that the officers were not trespassing at the time they first spotted the marijuana. Therefore, the Court held that where the initial view was conducted through a trespass, subsequent searches were invalid.

In the instant case, there was no justification for the illegal entry onto the premises by Lester Stuck. "No trespassing" signs were evident as reflected by the following excerpt from the record:

Q: You do know there are signs posted there on the property?

A: There are signs in the paved road, yes, sir. There are signs there.

Q: It's fairly accurate to say there are signs pretty well all the way around the property aren't there?

A: I didn't see them on the backside, but I would say there probably are.
(M.S. 156, testimony of Lester Stuck)

It was also brought out at trial that any citizen would notice the "no trespassing" signs surrounding the property if walking down the road to the farm area. (T. 41) It must be concluded that Lester Stuck and Steve Rhinehart were trespassers on the property and all evidence obtained was in violation of the Fourth Amendment.

3. THE DECISION BELOW FAILS TO DETERMINE WHAT PROCEDURES SHOULD BE FOLLOWED BY LAW ENFORCEMENT OFFICERS TO PROTECT A DEFENDANT'S RIGHTS BEFORE DESTROYING EVIDENCE IN A CASE.

In this case law enforcement officers destroyed all but 100 grams of the seized marijuana by burning it without first notifying the defendant or his counsel and without obtaining a court order. The agents knew from the very beginning that Petitioner had an attorney because the Petitioner insisted on calling the attorney when he was served with a search warrant. The law enforcement agents could have easily notified petitioner's attorney of the planned destruction of the alleged contraband.

Since this was an issue of first impression in the Georgia appellate courts federal case law must give us guidelines. Where there is a loss or destruction of evidence, federal courts have held that they will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the government, or, (2) that he was prejudiced by the loss of evidence. See *United States v. Henry*, 487 F.2d 912 (9th Cir. 1973); *United States v. Heiden* 500 F.2d 898 (9th Cir. 1974); *United States v. Picariello* 568 F.2d 222 (1st Cir. 1978).

There was bad faith by law enforcement officials here in that the contraband was burned by agents on specific instruction from the District Attorney who prosecuted this case. When agents called District Attorney Wilson he concurred in the decision to destroy the marijuana. Furthermore, it was determined that a court order would not be necessary. The State stipulated at the trial that there was never an order by any judge authorizing the destruction of the property. The destruction of the evidence in this cause

without notice to Petitioner's counsel, when the name of Petitioner's counsel could have ben easily obtained, was in itself a showing of bad faith.

Furthermore, petitioner was prejudiced by this destruction of evidence. One of the main issues at trial concerned the weight of the marijuana actually prohibited by statute; i.e., which portion of the marijuana consisted of stems, stalks and fiber. The weight of the marijuana was of vital interest to the defense since the weight of the marijuana determined the severity of the crime and whether the Petitioner possessed the minimum statutory poundage to be guilty of trafficking marijuana, period. Thus, the agents, in conjunction with the District Attorney, deprived the defense and the trial court the opportunity to independently test the weight of the marijuana seized, since all but 100 grams were ex parte, unilaterally and without notice destroyed.

The Court of Appeals did state that it would have been "far wiser to notify the Appellant and his attorney of the destruction of the contraband" and that the practice of destroying evidence without prior notice has been soundly denounced. However, the appellate court failed to reverse the petitioner's conviction on this ground.

The Petitioner in this case was not afforded notice of the impending destruction of evidence and should have been given an opportunity to oppose it. In the absence of such notice, the case against Lang should have been dismissed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the State of Georgia.

Respectfully Submitted,

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Counsel for Petitioner

September, 1983

APPENDIX A

SUPREME COURT OF GEORGIA

Atlanta, June 15, 1983

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Gregory T. Lang v. The State

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta, July 1, 1983

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, *Clerk*.

Case No. 65258
Court of Appeals of Georgia
Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

NOVEMBER, 1982
AFFIRMED JAN. 31, 1983

65258. LANG v. THE STATE (Bi-233)

BIRDSONG, Judge.

Gregory T. Lang was convicted by the trial court of trafficking in marijuana by possessing more than one hundred pounds, and of felony possession of drug-related objects. The conviction arises out of Lang's operation on his farm of a sophisticated indoor marijuana cultivation project consisting of approximately one thousand marijuana plants in a large metal building protected by an electric eye-beam alarm system and two additional large metal buildings under construction. The seizure of evidence under warrant exposed the potted plants, several large bags and boxes of harvested marijuana; and 4,125 soil cups in a "nursery" behind the building. The building was 60 feet by 135 feet, and 16 feet high. It was completely fiberglass insulated and was equipped with five 48-inch exhaust fans, six large gas heaters, eighty-six 1,000-watt mercury vapor lights suspended from the ceiling by steel cables, and ten automated control timers. Also seized from the building were soil test kits, pamphlets and records pertaining to planting schedules and planting soil and equipment.

The warrant under which this search was made was issued upon the sworn affidavit of GBI agent Gary Newman particularly describing the appellant, the farm premises, and the target buildings, and reciting: "And that the facts tending to establish the foregoing grounds for Is-

suance of Search Warrant are as follows: Tuesday, December 29, 1981, Gordon County Sheriff Pat Baker was contacted by a confidential informant. Said informant has proven reliable in the past by providing information leading to the arrest and conviction on drug charges of at least one suspect. Said informant has provided information on more than one previous occasion. His information has never proved to be untruthful. Sheriff Baker obtained the following information from said informant: Said informant has personally been on the property of Spring Lake Meadow Farm in the very recent past, prior to giving this information to Sheriff Baker. Greg Lang, operator of Spring Lake Meadow Farm, is presently storing marijuana in the above described building on said premises. This building and surrounding property are protected by an outside alarm system (electric eye beams). On Monday, January 4, 1982, Investigator Lester Stuck, Gordon County Sheriff's Office, accompanied the Gordon County Building Inspector to the above described premises. Investigator Stuck observed the alarm system as described by the confidential informant on the premises. The Gordon County Building Inspector attempted to conduct a routine final inspection of the above described building. An individual, identifying himself as Greg Lang denied the building inspector access to said building. Lang stated that the building was used for agricultural purposes. On Tuesday, January 5, 1982, the affiant received the above information from Sheriff Baker and Investigator Stuck."

Appellant Lang enumerates seven errors on appeal. In deciding the issues in this case, we have sifted out, as irrelevant, arguments and injection of evidence concerning other subsequent searches of Lang's residence and farm and other evidence of corroboration of the original search,

since the conviction was based on the described evidence of marijuana cultivation seized under authority of the described affidavit alone and the information contained therein. *Held:*

Appellant contends the search warrant was invalid because the executing magistrate was not neutral and detached, a conclusion reached by appellant because the magistrate admitted, after first having denied, that at sometime in the past in an unrelated incident or incidents, he had signed blank warrants to accomodate an officer when he (the magistrate) was to be at a family dinner. Appellant contends this fact shows a close and biased or partial relationship with law enforcement officers sufficient to render the warrant invalid because the magistrate was not neutral and detached, as in *State v. Guhl,* 140 Ga. App. 23 (230 S.E.2d); *Baggett v. State,* 132 Ga. App. 266 (208 S.E.2d 23); and *Jackson v. State,* 150 Ga. App. 67 (256 SE2d 670). We find no merit in this enumeration. The incident suggested by appellant to show bias and partiality was an isolated incident or incidents in the past and there is no evidence except remote speculation that the magistrate's posture in issuing the search warrant in this case was not neutral and detached. *Pressel v. State*, 163 Ga. App. 188 (____S.E.2d____). Moreover, the evidence shows the sheriff, upon learning of any such blank warrants, had destroyed them and called them "taboo," thus negating any inference that special partial relationship existed between his office and the magistrate or that he permitted his officers and colleagues to obtain warrants signed in blank. No showing exists in this case that the magistrate who issued the warrant was not neutral and detached in the issuance of this warrant.

2. Appellant contends that the search warrant was without probable cause because the information (infor-

mant) was not shown to be reliable, there was no corroborating evidence to support the informant's allegations, and the information obtained from the informant was stale. None of these contentions have merit.

The informant was established as reliable, he having previously on more than one occasion given to the sheriff truthful information which, moreover, lead to at least one conviction. *Shaner v. State*, 13 Ga. App. 694, 696-699 (266 S.E.2d 338). Compare *Fowler v. State*, 128 Ga. App. 501, 503 (197 S.E.2d 502); *Pickard v. State*, 152 Ga. App. 707 (3) (263 S.E.2d 679); see *Giles v. State*, 149 Ga. App. 263 (254 S.E.2d 154). Moreover, the information was sufficiently detailed to show that it was more than a mere casual rumor or accusation made on reputation, and stated that the informant had ben on the property "in the very recent past" and that "Greg Lang is presently storing marijuana in the described building." *Collins v. State*, 161 Ga. App. 546 (287 S.E.2d 708); *Jones v. State*, 154 Ga. App. 21, 23 (267 S.E.2d 323). The information was, on its face and by its own terms, not stale.

Additionally, the credibility of the informant and the reliability of his information was corroborated by the officer. The deputy corroborated the information by arranging to accompany the county building inspector on an "inspection" onto property that was posted with "No Trespassing" signs at the junction of a paved county maintained road and the unpaved county maintained road that served as appellant's driveway; but the deputy merely sat in the car and observed the white metal building with electric-eye beam alarm system, which he later said did not look like any hay storage system he had ever seen. The officer also observed an electric-eye beam alarm system over appellant's driveway. He saw two more similar metal buildings under construction, and an electric-eye beam

alarm system set up on a perimeter around those buildings, as was suggested by the informant. The deputy was accompanying a county official on a route and on business as to which the appellant had no reasonable expectation of privacy. See *State v. Nichols,* 160 Ga. App. 386 (287 S.E.2d 53). The buildings the deputy observed were not dwelling houses and were not used as offices. *Giddens v. State,* 156 Ga. 258 (274 S.E.2d 595) (U.S. cert. denied). Moreover, the fact that "no Trespassing" signs were posted over the driveway is a technicality which does not negate what the deputy saw while accompanying the building inspector and does not render the otherwise valid search warrant invalid. *Dunbar v. State*, 163 Ga. App. 243 (____S.E.2d____). No unreasonable search and no seizure took place, only a visual inspection which, even if it was more "undercover" than appellant would have liked, is not therefore unreliable or unlawful so as to render the search warrant one not based on probable cause. As to questions raised by appellant that the affidavit was infected by "hearsay on hearsay," see *Williams v. State*, 157 Ga. App. 476, 478 (277 S.E.2d 923).

Subsequent searches of Lang's residence and farm were not illegal; and, in any case, we do not need address them as no evidence obtained therby formed the basis of the conviction and any result of the searches was harmless beyond a reasonable doubt.

The trial court did not err in refusing to quash the indictment on grounds that the marijuana, except for 100 grams, was destroyed by law enforcement agents with approval of the district attorney, without notice to the appellant or his attorney; nor did the state fail to prove beyond a reasonable doubt that appellant possessed 100 pounds of marijuana.

Surely it would have been far wiser to notify the ap-

pellant and his attorney of the destruction of the contraband, especially since appellant was to be charged with trafficking, i.e., possession of more than 100 pounds of marijuana, and since as it happens the total 870 pounds of marijuana weighed contained some undetermined amount of trash, debris, and included stalks of plants that cannot be considered contraband (O.C.G.A. § 16-13-32.2(3)). The practice of destroying evidence without prior notice to the accused has been soundly denounced (see United States v. Henry, 487 F2d 912), and with good reason for the state's protection as well as the defendant's. Still, we find no fatal prejudice in this destruction of all the evidence except 100 grams. The state crime laboratory forensic chemist and investigating officers testified the bags of processed marijuana, including trash and debris, weighed 144 pounds. It may be inferred beyond a reasonable doubt that the remainder of the total 870 pounds of marijuana, i.e., the plants including stalk (cut off above the roots), therefore weighed 726 pounds. The state's expert testified that in his opinion and estimate, approximately two-thirds of a marijuana plant is stalk, the inference thus being reasonable that the remaining one-third is chargeble marijuana under Code Ann. § 79A-81(3) (O.C.G.A. § 16-13-32.2(3); this amounts to 242 pounds of marijuana. As it happens in this case, the evidence is so overwhelming that appellant possessed more than 100 pounds of marijuana, that the destruction of all but 100 grams without notice to appellant or his attorney, even if it was erroneous as regards the appellant, was harmless beyond a reasonable doubt (see *Hamilton v. State*, 239 Ga. 72, 77 (235 S.E.2d 515)), and if only by accident, did not prevent the state from proving possession of 100 pounds.

Finally, appellant contends the trial court erred in refusing to quash the indictment on grounds that defendant was

not permitted a full and fair hearing on his motion to suppress.

This argument is based upon an irregularity in procedure. The original indictment in this case was quashed at the pretrial motions hearing, because the indictment did not contain the names of the of the grand jurors. The trial court offered to dismiss appellant's motion to suppress "with prejudice" (although this threat was certainly empty, since due process could not permit appellant to be denied a motion to suppress hearing upon a subsequent reindictment). Appellant contends the trial court was without jurisdiction to hear the motion to suppress, since the indictment had been quashed; but this is not true, since we can find no clear authority for it (see, e.g., Code Ann. § 17-5-30) and because this trial court did have jurisdiction of the case, including preliminary hearings and habeas corpus proceedings since Lang's arrest. Moreover, proceeding with the suppression hearing at this point was as much to appellant's advantage as to any disadvantage, since as the trial judge aptly pointed out, if the suppression hearing resulted in the evidence being suppressed, then the state would have nothing to show the grand jury to reindict. The appellant proceeded with the motion to suppress. Subsequently, appellant retained other counsel, who after reindictment, moved to reopen the entire suppression proceedings and hear it all over again. He was refused, but he was allowed to reopen the evidence on the question of neutrality of the magistrate. We see no harm or illegality in the trial court's refusal to provide another complete motion to suppress. Appellant has shown nothing new, except what he was allowed to relitigate, which would raise the question of error. The search warrant and affidavit speak for themselves. Appellant's previous attorney made a fair and complete examination of the evidence; the record was before the trial court on reindictment. He saw no error in

it and neither do we. And as far as the argument that the trial court did not have jurisdiction to hear the motion after the first indictment was quashed (see *Yarbrough v. State,* 151 Ga. App. 474 (260 S.E.2d 369)), we will not reverse, for to do so would be a perversion of justice. *Hamilton v. State,* supra.

Judgment affirmed. McMurray, P.J., and Banke, J., concur.

APPENDIX C

Court of Appeals of the State of Georgia

ATLANTA, March 2, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

65258 Gregory T. Lang v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Note: Additional pages were written on motion for rehearing. Please add attached pages at the back of your original opinion dated January 13, 1983. Judgment line remains the same.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, Mar. 2, 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.
Alton Hawk

COURT OF APPEALS
OF THE STATE OF GEORGIA

65258. LANG v. THE STATE (Bi-233)

ON MOTION FOR REHEARING

Appellant Lang contends this court erred in concluding that the state had proved trafficking in at least 100 pounds of marijuana and that the destruction of the contraband without notice to the defendant was therefore harmless (see Division 4 of opinion). Appellant directs our attention to OCGA § 16-13-32 (former Code Ann. § 79A-811.1) for the proposition that not merely the stalks, but "certain seeds, fiber and oil from the plant should not be included in the weight"; and since there was not testimony as to how much of the marijuana, excluding stalk, consisted of other parts which cannot be considered contraband, the state could not establish trafficking in 100 pounds.

We do not find that OCGA § 16-13-32 excludes "certain seeds, fiber and oil from the plant" as contraband. OCGA § 16-13-21 (16) provides: " 'Marijuana' means all parts of the plant of the genus Cannabis, whether growing or not, the seeds thereof, the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include samples as described in subparagraph (3)(P) of Code Section 16-13-25) (chemically extracted and synthetically derived THC, *Aycock v. State*, 146 Ga. App. 489 (246 SE2d 489)) and shall not incude the mature stalks of such plant, fiber produced from such stalks, oil, or cake (see *Aycock,* supra, p. 491-493), or the completely sterilized samples of seeds of the plant which are incapable of germination." The evidence shows that the forensic expert

and officers cut the approximately 1,000 plants at the base of the stalks and placed these plants in boxes. The boxes contained "leafy materials," that is, only plants, two-thirds of which were estimated to be stalk. There was no evidence that any processed material such as "oil or cake, or the completely sterilized samples of seeds of the plant which are incapable of germination," was placed in the boxes. Only cut leafy plants were placed in the boxes; the total weight of these was 726 pounds, two-thirds of which was stalks, leaving 242 pounds of leafy material identified as marijuana. Moreover, in addition to this 242 pounds of leafy material (cut plants) were fifteen plastic bags and boxes containing already processed marijuana and some undetermined amount of trash and debris, and weighing 144 pounds, which we did not include in our determination that the state had proved beyond a reasonable doubt the offense of trafficking in excess of 100 pounds of marijuana (OCGA § 16-13-31(c)). We do not think any remotely reasonable doubt exists in this case that at least 100 pounds of chargeable marijuana, excluding chemically extracted or sythetically derived THC (*Aycock v. State*, supra) and "the mature stalk of such plant, fiber from the stalks, oil or cake or the completely sterilized seeds of the plant incapable of germination." See *Aycock*, supra.

Appellant further contends we erred in our holding in Division 5 of the opinion, in refusing to find he was denied a full and fair motion to suppress hearing upon a proper indictment. The full motion to suppress hearing was held notwithstanding the fact that the indictment under which appellant was charged, had just been quashed. Appellant contends the trial court was then without jurisdiction to proceed with the motion to suppress. Appellant concedes that his point, that the trial court which quashed the first indictment did not have jurisdiction to hear the motion to

suppress, and hence the motion to suppress hearing was a nullity, is an issue of first impression. OCGA § 17-5-30(c) provides: "The motion [to suppress] shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made made only before the court in which the accusation, indictment, or special presentment is filed and pending." The code section means simply that the ruling of "another judge in another jurisdiction on another motion to suppress" the same evidence will not be controlling in a subsequent prosecution of the offense. *Aikens v. State*, 143 Ga. App. 891 (240 SE2d 117).

Section 17-5-30 merely provides "*If* a criminal accusation is filed or *if* an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment or special presentment is filed and pending" – i.e., the motion to suppress cannot be filed in another court (emphasis supplied). In *Cook v. State*, 141 Ga. App. 241 (233 SE2d 60), we held that evidence once suppressed cannot be reintroduced as to a second indictment; obviously the evidence in that case was suppressed before the second indictment was "filed and pending," but the suppression was still valid for the obvious reason that if the evidence is wrongly obtained, it is not rendered admissible by a reindictment. The same reasoning should apply where the motion to suppress is denied, for the state as well as the defendant ought to be entitled to the finality of a ruling on the propriety of a search. If the search and seizure is valid for one indictment, it is valid for all. As to a reindictment or second indictment, it makes no substantive difference if the evidence was ruled admissible when a first indictment was void, or was merely later dismissed. If we followed appellant's reasoning – that the subject indictment must be

pending and valid when the motion to suppress is heard – a ruling on a motion to suppress ruling would be without force where the defendant, or other persons, are later indicted for other crimes arising out of the same conduct and provable by the same evidence. In that case a ruling on a motion to suppress would never be final. Every indictment or prosecution, for every co-defendant, would require a new hearing on a new motion to suppress the same evidence. On a subsequent indictment or reindictment, there is no reason of substance to challenge the previous ruling on the question of evidence, merely because the instant indictment was not pending when the ruling was made. The appellant does not have a constitutional right to what he claims, but only to be protected from wrongful search and seizure; and this procedure does not violate that right. Appellant would have us elevate procedure over substance. Appellant appeared before the instant court answering an indictment alleging a felony. He does not contend the court lacked jurisdiction over the person or offense, at least until the indictment was quashed for a procedural deficiency. Had the trial court ruled on all appellant's other motions prior to ruling on the motion to quash, Lang could hardly argue that the court did not have before it an indictment for a crime and a person accused thereof. We will conclude that the statutory provisions were satisfied in that the motion to suppress was presented to a court which had before it an indictment and jurisdiction to try the offense. The grant of the quashing motion did not deprive the court of jurisdiction, but simply placed the burden upon the state to perfect the indictment or suffer dismissal.

The reasoning of what we say can be most easily illustrated in this case, where the appellant is unable to show any harm or prejudice or error by the fact that the motion to suppress hearing was held after the defective in-

dictment was quashed and before a valid indictment was filed against him. If any real harm is shown in a case such as this, we will not hesitate to correct the error; but this evidence in this case being properly admissible, it would do no violence to justice to exclude it merely for breach of procedure.

Motion for rehearing denied.

APPENDIX D

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	INDICTMENT
V.	:	NOS. 2022
	:	and 2023
GREGORY T. LANG	:	

MOTION TO QUASH AND
MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes the Defendant, through counsel, and moves the Court for an Order quashing the indictments, showing in support thereof the following:

1.

Defendant has been furnished with a copy of the laboratory analysis in this case, and a copy is attached hereto as Exhibit "A."

2.

Defendant shows that at sometime unknown to him, after his arrest, the State, without Court Order and without notifying the Defendant or his counsel, destroyed certain alleged marijuana purportedly taken from Defendant's premises. Because of this, Defendant is unable to have his expert test the exact substances seized in the form in which they were seized. Thus, the Defendant has been deprived of his constitutionally protected right to due process of law and will be denied a fair trial in violation of the

Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See also *United States v. Henry,* 487 F.2d 912 (9th Cir. 1973); *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971); and *United States v. Picariello,* 568 F.2d 222 (1st. Cir. 1978).

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.
/s/
MARK J. KADISH
ATTORNEY FOR DEFENDANT

700 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-2000

APPENDIX E

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	INDICTMENT
	:	NOS. 2022
GREGORY T. LANG	:	AND 2023

DEFENDANT'S MOTION FOR RECONSIDERATION AND AMENDMENT TO MOTION TO SUPPRESS

Comes now the Defendant, GREGORY T. LANG, by and through his undersigned counsel, and moves the Court to reconsider its prior ruling on the Defendant's Motion to Suppress, reopen evidence and suppress all evidence seized, tangible and intangible, as set forth specifically in Defendant's Motion to Suppress and his Amended Motion to Suppress, as set forth hereinafter:

In support of said Motion, the defendant would show as follows:

1.

On December 30, 1981, an aerial search was conducted of the defendant's farm in Gordon County. This search was conducted without a search warrant.

2.

On January 4, 1982, a search was conducted of the defendant's farm under the guise of an administrative search. Officers of the Gordon County Sheriff's Department thereby trespassed upon the defendant's land and

conducted an unlawful search and seizure. This search was conducted without probable cause. Exigent circumstances did not exist to justifying the warrantless entry.

3.

Any evidence seized, discovered or produced after or as a result of said illegal searches and seizures are inadmissible in the trial of this case. See, *Wong Sun v. United States,* 371 U.S. 471 (1963)

4.

On January 5, 1982, a search warrant was obtained in violation of the Fourth Amendment for purposes of searching a certain metal building on defendant's farm. This first search warrant was based on the fruits of the initial illegal search and seizure. The evidence obtained thereby is, therefore, inadmissible. See gen. *Wong Sun v. United States, supra.*

5.

The information contained in the affidavit for the first search warrant was inadequate to allow the Magistrate to make a valid finding of probable cause. The information contained in the affidavit was based on information from an informant that was not adequately proved to be reliable. The affidavit failed to contain adequate corroborative evidence of the informant's statements. Any corroborative information was illegally obtained. The information received from the informant was stale at the time the search warrant was issued.

6.

The Magistrate who issued the first search warrant, Justice of the Peace Warren Smith, was not a neutral and detached magistrate for purposes of the Fourth Amendment analysis.

7.

The second and third search warrants were obtained as a result of the initial illegalities of the warrantless searches and the first illegal search warrant. These primary illegalities taint the second and third search warrants, thereby invalidating them.

8.

The residence of the defendant was searched within the parameters of the Fourth Amendment without a proper search warrant.

9.

No consent was obtained for search of the residence prior to the execution of the third search warrant.

10.

A hearing was held on March 10, 1982, in which some evidence was taken in support of Defendant's Motion to Suppress. On that same date, the Court quashed the indictment under which the defendant had been indicted and motions filed.

11.

Subsequently, the defendant was indicted by a Grand Jury in Gordon County, Georgia, and has now moved for

reconsideration and refiling of certain motions, including this his Motion for Reconsideration and Amendment to his Motion to Suppress.

12.

New facts have surfaced since March 10, 1982, which strongly support Defendant's Motion to Suppress. These facts were not available to defendant despite his diligent effort.

13.

This Court's failure to allow the defendant to reopen testimony and evidence pursuant ot the new indictment Nos. 2022 and 2023 would violate his rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The defendant will have been denied a full and fair hearing on his Motion to Suppress, a right granted to him under the Georgia Laws and Constitution and the Constitution of the United States. See *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037 (1976).

WHEREFORE, the defendant respectfully prays as follows:

(a) That the Court grant his Motion for Reconsideration of his Motion to Suppress; and

(b) That a hearing be held on this matter and the defendant permitted to introduce evidence and testimony in support of his Motion for Reconsideration and his Amended Motion to Suppress; and

(c) That the Court grant his Motion to Suppress and order the materials seized as a result of the unlawful searches and seizures described herein suppressed; and

(d) That defendant be allowed to amend his Motion as disclosure of evidence provides and warrants further basis for relief; and

(e) For such other relief, both legal and equitable, which the Court deems just and proper.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

MARK J. KADISH
Attorney for Gregory T. Lang

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Atlanta, Georgia 30303
(404) 688-2000

APPENDIX F

IN THE SUPERIOR COURT OF GORDON COUNTY

STATE OF GEORGIA	:	
V.	:	
GREGORY T. LANG	:	INDICTMENT NOS. 2022 and 2033

ORDER

Defendant's three Motions to Quash Indictment having come on regular for hearing, and after argument of counsel; defendant's Motion is hereby denied.

This 6th day of April, 1982.

Jere F. White
Judge, Superior Courts
Cherokee Judicial Circuit

APPENDIX G

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	INDICTMENT
v.	:	NOS. 2022 and 2033
GREGORY T. LANG	:	

ORDER

Defendant's Motion for reconsideration and amendment to Motion To Suppress having been filed by his attorney, Mark J. Kadish, the matter come on regular for hearing. After hearing evidence and argument of counsel it is the judgment of this Court that defendant's Motion be and is denied.

This 6th day of April, 1982.

JERE F. WHITE
JUDGE OF SUPERIOR COURTS
CHEROKEE JUDICIAL CIRCUIT

APPENDIX H

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

STATE OF GEORGIA,	:	
Appellee/Plaintiff	:	
	:	
v.	:	NO. 65258
	:	
GREGORY T. LANG,	:	
Appellant/Defendant	:	

ENUMERATIONS OF ERROR

COMES NOW the Appellant, GREGORY T. LANG, and files these his Enumerations of Error as follows:

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS SINCE THE ISSUING JUDICIAL OFFICER WAS NOT NEUTRAL AND DETACHED.

ISSUE II

THE SEARCH WARRANT ISSUED ON JANUARY 5, 1982, BY JUDGE SMITH WAS ISSUED WITHOUT PROBABLE CAUSE SINCE (A) THE INFORMATION WAS NOT SHOWN TO BE RELIABLE; (B) THERE WAS NO CORROBORATING EVIDENCE TO SUPPORT THE INFORMANT'S ALLEGATIONS,

AND (C) THE INFORMATION OBTAINED FROM THE INFORMANT CONTAINED IN THE SEARCH WARRANT WAS STALE.

ISSUE III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS SINCE THE WARRANTLESS SEARCH OF THE FARM WAS ILLEGAL AND THEREFORE INFORMATION OBTAINED DURING THE ILLEGAL SEARCH COULD NOT BE USED AS EVIDENCE TO CORROBORATE THE INFORMANT'S TIP SET OUT IN THE SEARCH WARRANT AFFIDAVIT.

ISSUE IV

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND THAT THE SEARCHES CONDUCTED AFTER THE EXECUTION OF THE INITIAL SEARCH WARRANT WERE ILLEGAL.

ISSUE V

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO QUASH THE INDICTMENT SINCE THE DESTRUCTION OF THE MARIJUANA BY LAW ENFORCEMENT AGENTS, IN THE ABSENCE OF A COURT ORDER, RESULTED IN PREJUDICE TO THE DEFENDANT.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING DEFENDANT GUILTY OF TRAFFICKING IN MARIJUANA SINCE THE STATE WAS UNABLE TO PROVE THAT THE DEFENDANT GREW OR POSSESSED IN EXCESS OF ONE HUNDRED POUNDS OF MARIJUANA AS REQUIRED BY THE TRAFFICKING STATUTE.

ISSUE VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S "MOTION TO QUASH INDICTMENT" SINCE DEFENDANT WAS NOT PERMITTED A FULL AND FAIR HEARING ON HIS MOTION TO SUPPRESS THE EVIDENCE.

No. 83-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREGORY T. LANG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Counsel of Record for Respondent
Senior Assistant Attorney General

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
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PAULA K. SMITH
Staff Assistant Attorney General

Please serve:

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132 State Judicial Bldg.
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QUESTIONS PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's motion to suppress based on an alleged illegal search warrant, when an examination of the decision of the state court below makes it readily apparent that the denial of the same was squarely, clearly and adequately based on nonfederal grounds, i.e., the decision as based on state law.

2.

Whether the court below erred in concluding that the destruction of evidence without notice to Petitioner was harmless beyond a reasonable doubt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-349

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GREGORY T. LANG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for the
State of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

Prior Proceedings

The Petitioner, Gregory T. Lang, was indicted by the grand jury of

Gordon County for the offenses of trafficking in marijuana and possession of drug related objects. He waived trial by jury and was tried and convicted by the trial court on March 12, 1982. Petitioner was sentenced to ten years imprisonment and a $25,000.00 fine on the trafficking offense and to a twelve month probated sentence on the possession of drug related objects offense, on the condition that Petitioner pay the $25,000.00 fine.

Petitioner's convictions and sentences were affirmed at Lang v. State, 165 Ga. App. 576, 302 S.E.2d 683 (1983). Rehearing was denied on March 2, 1983. The Supreme Court of Georgia denied certiorari on June 15, 1983.

It is from the decision of the Georgia Court of Appeals that Petitioner seeks the issuance of the requested writ of certiorari.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. BECAUSE THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS WAS SQUARELY BASED ON NONFEDERAL GROUNDS, I.E., THE STATE COURT'S DECISION WAS BASED SOLEY ON STATE LAW, THIS COURT SHOULD NOT GRANT THE REQUESTED WRIT.

On this application for a writ of certiorari, Petitioner contends that the writ should issue as the search warrant upon which evidence was obtained and admitted at trial against Petitioner violated, in some manner unspecified on this instant

application, his rights under the Fourth and Sixth Amendment. Specifically, Petitioner has contended that the search warrant was not issued by a neutral and detached judicial magistrate and that information obtained during an allegedly illegal search was relied upon to obtain a search warrant. These issues were decided adversely to Petitioner by the Georgia Court of Appeals in Lang v. State, supra. That court found that Petitioner had made no showing that the Magistrate who issued the search warrant was not neutral and detached. That court also concluded that no unreasonable search occurred as to render the search warrant invalid.

An examination of the foregoing decision readily reveals that the

denial to Petitioner of relief on these two issues has been firmly and clearly grounded upon Georgia law concerning search warrants. The state court did not address or decide Petitioner's claims on anything other than state law.

With the foregoing in mind, Respondent notes that this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal or state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corporation v. Muller, 296 U.S. 207 (1935).

The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts

> after we corrected its views of Federal Laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

It is the Respondent's contention that there exists no federal question for review by this Court as to these two issues. An examination of the foregoing authorities, and the decision rendered by the state court, readily reveals that the decision on the issues concerning the magistrate and the search of the premises sought to be reviewed on this instant application for a writ of certiorari

is clearly and adequately grounded upon state law, as opppsed to federal law. Accordingly, there exists no federal question for review as to these issues.

B. THE COURT BELOW PROPERLY DETERMINED THAT THE DESTRUCTION OF EVIDENCE IN THIS CASE WITHOUT NOTICE TO PETITIONER WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner's heading as to his third issue--that the decision below fails to determine what procedure should be followed by law enforcement officers to protect a defendant's rights before destroying evidence in a case -- is a new issue which Petitioner improperly seeks to raise for the first time on this petition for a writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

In his third issue presented for review, Petitioner claims that the court below improperly determined that the destruction of all but 100 grams of the seized marijuana without notice to Petitioner was harmless error. Respondent submits that the decision of the court below was proper in light of the overwhelming evidence.

The Georgia Court of Appeals found the following facts:

> The State Crime Laboratory forensic chemist and investigating officers testified the bags of processed marijuana, including trash and debris, weighed 144 pounds. It may be inferred beyond a

> reasonable doubt that the remainder of the total 870 pounds of marijuana, i.e., the plants including stalk (cut off above the roots), therefore weighed 726 pounds. The state's expert testified that in his opinion and estimate, approximately two-thirds of a marijuana plant is stalk, the inference thus being reasonable that the remaining one-third is chargeable marijuana under Code Ann. § 79A-802 (O.C.G.A. § 16-13-21(16)); this amounts to 242 pounds of marijuana.

Lang v. State, supra at 579. (See Brief of Petitioner, Appendix B).

The state court acknowledged that it would have been wiser had the prosecution notified Petitioner and his attorney of the destruction of the contraband. The court recognized that the practice of destroying evidence without prior notice to the accused had been denounced in United States v. Henry, 497 F.2d 912 (9th Cir. 1973). However, the court found no "fatal prejudice" in the destruction of all the marijuana except 100 grams. The court concluded that the evidence was "so overwhelming" that Petitioner possessed more than 100 pounds of marijuana that the destruction of all but 100 grams without notice to Petitioner or his attorney, even if it was erroneous, was harmless beyond a reasonable doubt. Lang v. State, supra.

On the motion for rehearing, the state appellate court noted that there were fifteen plastic bags and boxes containing processed marijuana, weighing 144 pounds. Lang v. State, supra at 581. (Brief of Petitioner, Appendix C). The court indicated that the 144 pounds of processed marijuana had not been included in its previous determination that the state had proved Petitioner guilty of the offense of trafficking in excess of 100 pounds of marijuana beyond a reasonable doubt. The court further stated, "We do not think any remotely reasonable doubt exists in this case that there was proved at least 100 pounds of chargeable marijuana . . . " Id.

Relying on United States v. Henry, supra, Petitioner has claimed that the marijuana was destroyed by law enforcement officials in bad faith and that he was prejudiced by this destruction. Respondent acknowledges that that state stipulated at trial there was never an order entered by a judge authorizing the destruction of the marijuana. The decision to destroy the contraband was made by the sheriff and investigating officers after consultation with the district attorney. From these facts alone Petitioner would urge this Court to infer bad faith on the part of said officials. Respondent submits that there is no evidence to warrant such an inference.

There is no reason to believe that state officials were not acting in good faith when they destroyed the marijuana. Certainly, 870 pounds of marijuana would present storage problems as well as security problems. Respondent submits that the officials' actions in destroying all but 100 grams of marijuana were reasonable. The State Crime Laboratory forensic chemist maintained meticulous records as to the marijuana seized, and the records were made available to counsel for Petitioner. Moreover, Petitioner's own expert was permitted to examine and test the retained 100 grams. Respondent asserts that there is no evidence whatsoever to support an inference of

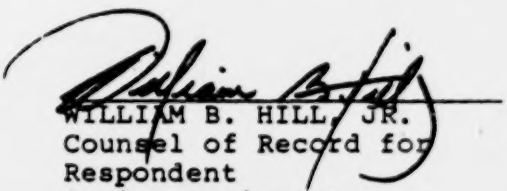
bad faith on the part of law enforcement officials in destroying the marijuana.

Additionally, Petitioner has failed to show that he was prejudiced by the destruction of this evidence. As found by the state appellate court, there was 144 pounds of processed marijuana. There was also 726 pounds of marijuana plants, of which 242 pounds would be chargeable under the trafficking statute. Respondent submits that the court below properly concluded that there was no reasonable doubt that the state had proved Petitioner was in possession of at least 100 pounds of marijuana. Therefore, Respondent respectfully submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals for the State of Georgia, as it is manifest that there exists no federal question for review by this Court as to two issues and, further, no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

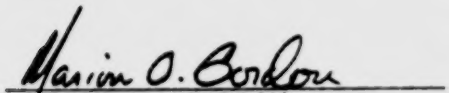


WILLIAM B. HILL, JR.
Counsel of Record for
Respondent
Senior Assistant
Attorney General

(Signatures continued)

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General



MARION O. GORDON
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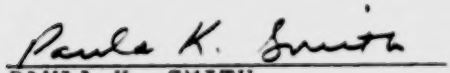
Attorney General



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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Mr. Gerald S. Rutberg
Post Office Box 977
Castleberry, Florida 32707

Mr. Darrell E. Wilson
District Attorney
Cherokee Judicial Circuit
Gordon County Courthouse
Calhoun, Georgia 30701

This 17th day of October, 1983.

/s/
WILLIAM B. HILL, JR.
Senior Assistant
Attorney General